[redacted]

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	Transmittal Nos. 873, 874, 893, 909, 910
GTE Telephone Operating Companies	)	CC Docket No. 94-81
	)	
Revisions to Tariff F.C.C. No. 1	)	

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REPLY OF GTE CALIFORNIA INCORPORATED TO APOLLO'S OPPOSITION FOR DECLARATORY RULING

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SUMMARY

Stripping away all of Apollo's obfuscation, Apollo's state court action seeks to have a state judge or jury ignore the filed tariff rate for the bandwidth in question and to substitute some other rate which, in its judgment, would be the "reasonable market rent" for this bandwidth. This is precisely why Apollo's action runs afoul of the filed rate doctrine.

There can be no doubt that a controversy presently exists between GTECA and Apollo which requires expeditious resolution by the Commission. All of the material facts are clear: (1) The Commission has asserted jurisdiction over the disputed bandwidth; (2) An effective tariff governs the rate which GTECA must charge for use of the bandwidth; and (3) Apollo's action asks the state court to ignore the tariff rate and determine its own rate for the bandwidth.

Whether pled as breach of contract or the implied covenant (Apollo's first cause of action), or as interference with contractual or business relations (Apollo's second cause of cation), Apollo can only establish damages if the state court rejects the tariff rate and determines its own rate. This is because Apollo's damages, if any, will be based upon a computation of lost future profits. Such lost profits would be calculated by deducting Apollo's expenses from operating the bandwidth (if Apollo had succeeded to Service Corp.'s interests) from any revenues Apollo would derive from such operation. The primary element of Apollo's expenses would be the rate it pays for the bandwidth. Rather that accepting the tariff rate for this calculation (as it must), Apollo specifically asks the state court to determine its own rate. Indeed, Apollo's declaratory relief claim (third cause of action) makes this perfectly clear: Apollo seeks a

"declaration that it has a valid enforceable contract right to lease the excess bandwidth at a reasonable market rent." Because the state court is poised to grant just such relief--in derogation of the filed tariff rate--the damages so calculated would constitute a preference (or rebate) in violation of Section 203 of the Act. The state court's action thus undermines the jurisdiction committed by Congress to the Commission over GTECA's rates.

Because Apollo's damage claim requires the state court to determine a rate for the bandwidth *other than* the tariff rate, Apollo's action also necessarily requires a retroactive judicial determination of the reasonableness of the tariff rate. The very authorities cited by Apollo in its Opposition confirm that its action seeks to involve the state court in a non-justiciable controversy, one which is committed to the Commission's jurisdiction. Again, the damages specifically requested by Apollo violate the filed rate doctrine.

For all of these reasons, the Commission's prompt declaration is necessary to preserve the tariff process established by Congress and repeatedly confirmed by the federal judiciary, as well as its own jurisdiction under Title II of the Act, from the insidious attack which Apollo now wages in the state court.

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I. INTRODUCTION

In this case, GTECA has filed two tariffs, each governing the use of one-half of the Cerritos network bandwidth, in order to comply with the Communications Act and the Commission's Rules upon expiration of the Cerritos Order[1] waiver. Apollo wants the second half of the bandwidth, but only at a rate greatly lower than the filed tariff.[2] Consequently, Apollo commenced a state court action to "enforce its contract right to utilize, at fair market rental, the second half of the bandwidth on the Cerritos system." (Opposition, at 6.)

Apollo disingenuously contends that its state court action has nothing to do with the tariffs filed by GTECA, because there is no tariff in existence that governs Apollo's lease of the disputed bandwidth. What Apollo's argument chooses to ignore, however, is that by seeking to enforce its contractual rights over the *now tariffed* bandwidth, Apollo undertakes to usurp the Commission's authority to regulate a common carrier service. In particular, the "damages," if any, available to Apollo in the state court action

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[1] *In re General Telephone Co. of California*, 4 FCC Rcd 5693 (1989).

[2] *See*, footnote 7, *infra.*

depend upon what Apollo would have received as profit from the lease of the bandwidth, if Apollo had succeeded to Service Corp's interests. Such lost profits would be calculated by deducting Apollo's expenses resulting from operation of the bandwidth from any additional revenues it might derive. In this calculation, the tariff rate for the bandwidth would constitute the primary expense item underlying Apollo's damage showing. For Apollo to recover its future profits, it may not ignore the primary expense it would be compelled to pay--the tariff rate. But this is precisely what Apollo is asking the state court to do--to ignore the tariff rate and opine *its own rate* for the bandwidth. Thus, Apollo is specifically seeking to undermine the Commission's exclusive jurisdiction over the rates which GTECA may charge for a common carrier service.

In a defense which defies reason, Apollo asserts that the Commission does not have even have Title II authority over GTECA's Cerritos network. (Opposition, at 9.) Apollo also contends that the tariff filings by GTECA in 1994 were never directed by the Commission--wholly ignoring that they were required by the Act and the Commission's

rules. *See* 47 U.S.C. § 203; 47 C.F.R. § 61.1(c). *Id.*[3] However, in its July 14, 1994 Order, the Bureau expressly rejected Apollo's contention that GTECA's continued provision of video signal transport to Apollo constituted private carriage for which a tariff was not required. *See* July 14, 1994 Order, at 13 (¶ 33), attached to GTECA's Motion as Exhibit A. Nonetheless, it seems that Apollo will continue to advance these arguments--both here and before the state court--unless and until the Commission reiterates its prior rulings. GTECA therefore respectfully requests that the Commission clarify the fundamental differences between the parties by declaring: (1) that the Commission has asserted Title II authority over GTECA's Cerritos video network, and (2) that upon expiration of the good cause waiver GTECA's provision of video signal transport to Apollo (and Service Corp.) could only continue under tariff.

Assuming the Commission has asserted its Title II authority and that tariffs were required, a further declaration is necessary with respect to Apollo's requested relief in the state court action: That Apollo's requested relief, if calculated using some state

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[3] For example, Apollo cites to the *Remand Order* (8 FCC Rcd 8178, 8183 (1993)) for the proposition that the Commission never directed GTECA to file its tariffs in 1994. However, in its *Remand Order*, the Commission rescinded *both* the waiver and GTECA's Section 214 operating authority and ordered GTECA to come into compliance under the Act and its rules. Since the Ninth Circuit stayed the *Remand Order*, GTECA was able to continue to operate the network under its original Section 214 authority. Nonetheless, upon expiration of the waiver in July of 1994, GTECA was *still* required to come into compliance with the Act's tariffing requirement and the Commission's implementing rules. Although the Commission did not precisely specify how GTECA could come into compliance when the waiver expired (as opposed to the *Remand Order*'s revocation of the waiver *and* GTECA's operating authority), the only viable option was to convert the network into a tariffed arrangement. The other alternative, divesting the Cerritos facilities, would have caused GTECA irreparable injury. *See* Declaration of Virginia K. Sheffiend, at 6-11, attached as Exhibit 7 to Apollo's Opposition. Of course, the Commission has *never* suggested that divestiture would be required upon waiver expiration. The point is that in order to continue to provide video signal transport, GTECA was required to tariff its service arrangements with Apollo and Service Corp.

court determined "reasonable rate," would violate the rate-filing provision of Section 203 of the Act which forbids a customer from receiving a preference or rebate from a common carrier. This is because Apollo seeks monetary damages flowing from alleged breach of the implied covenant of good faith and fair dealing and for tortious interference with business relations.[4] The measure of these damages (as determined by Apollo's lost profits) necessarily requires the state court to determine the lease rate for the bandwidth in order to calculate Apollo's expenses. If the state court erroneously concludes that Apollo's damages should be calculated pursuant to some rate other than the tariff rate--which is precisely what Apollo has asked the state court to do--such a finding would give Apollo *a preference* in direct violation of the filed rate doctrine. Indeed, allowing Apollo to proceed before a state court judge or jury to determine the "reasonable rate" for the bandwidth would undermine the power vested in the Commission under the Act to determine the reasonableness of tariff rates.

Accordingly, GTECA's requested declaration is necessary to preserve the Commission's regulatory authority over the Cerritos network, particularly in light of the

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[4] Actually, the true nature of relief claimed by Apollo is uncertain--GTECA cannot determine whether Apollo is alleging a breach of contract claim or a breach of the implied covenant claim. Similarly, GTECA cannot determine whether Apollo's tortious inference claim relates to existing relationships or to future advantages. These issues, among others, are the subject of demurrer now pending before the state court. Any uncertainty as to its claims has, of course, been created by Apollo. In any event, this uncertainty is irrelevant to the instant motion, since Apollo has made clear its request that the state court reject the tariff rate for the bandwidth and determine its own rate.

recent refusal by the state court to stay Apollo's contract action until the Commission has issued its order with regard to the tariff investigation.[5]

II. ARGUMENT

A. A Declaratory Ruling Is Necessary To Terminate The Controversy Between The Parties As To Whether Apollo's State Court Action Violates Section 203(c) Of The Act.

Pursuant to Section 5(d) of the Administrative Procedure Acts, "the agency, . . . in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty." 5 U.S.C. § 554(e). The Commission has wide discretion within this framework to determine whether a declaratory ruling is necessary. *Yale Broadcasting Co.v. F.C.C.*, 478 F.2d 594, 602 (D.C. Cir. 1973), *cert. denied*, 414 U.S. 914 (1973).

Apollo cites *Harry Furgatch*, 62 Rad.Reg.2d (P&F) 930, 931 (1987), for the proposition that the Commission "will not issue declaratory rulings to resolve abstract questions of law[.]" (Opposition, at 13.). However, Apollo conveniently fails to quote the remainder of the sentence which reads "without the requisite showing of a 'controversy' or 'uncertainty.'" *Harry Furgatch*, at 931.

Here, a controversy clearly exists between the parties as to whether Apollo's state court action violates the anti-discriminatory rate provisions of the Act. GTECA

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[5] GTECA believes the state court erred in denying GTECA's motion to stay the state case pending the conclusion of the Commission's investigation. This error reflects a belief by the state court that it may make its own determination of the reasonableness of the rate for the bandwidth irrespective of the actual tariff rate. *See* Reporter's Transcript of Proceedings, at 43, lines 15-17, attached to Apollo's Opposition at Exhibit 1. Thus, it is perfectly clear that the state court is prepared to, and will, set its own rate for the bandwidth regardless of the result of the Commission's tariff investigation unless the Commission intervenes.

contends that the Act and the Commission's rules in effect upon waiver expiration required operation of the Cerritos network, including any lease of the bandwidth in question, to continue only upon tariffed terms. Apollo, in contrast, insists that the Cerritos network is not subject to the Commission's jurisdiction. Apollo therefore seeks to enforce certain private contracts by obtaining damages based on GTECA's filing of the tariffs. GTECA asserts that, since provision of this service is now governed by tariff, the preexisting contract terms cannot be enforced. Therefore, permitting damages based on those terms--which Apollo demands of the state court--would constitute a preference. Thus, there can be no question that an actual controversy exists.

Apollo also mischaracterizes the relief which GTECA seeks. GTECA is not seeking an abstract and broad ruling that "civil recovery of damages from that carrier based on contracts related *in any way* to the filed tariffs is barred by Section 203(c) of the Act." (Opposition, at 13 (emphasis added).) Rather, GTECA has requested a very specific ruling: That the precise damages which Apollo seeks would violate Section 203 of the Act. Stated otherwise, GTECA seeks a specific ruling that damages

calculated pursuant to contract terms which *directly contradict* the tariff rates violate Section 203(c).[6]

Despite Apollo's contrary assertion, the material facts are "clearly developed and essentially undisputed." *American Network, Inc.*, 65 Rad.Reg.2d (P&F) 1519, 1523 (Com. Car. Bur. 1988). More than "sufficient information" has been provided "to enable the Commission to resolve the controversy in a meaningful manner." *Id.* As set forth in great detail in GTECA's motion, as well as in the Bureau's July 14, 1994 Order, the parties were originally involved in a contractual relationship which governed the lease of the bandwidth at issue in Apollo's state action. Subsequently, upon expiration of the waiver in July 1994, the parties were required to come into compliance with the Act and the Commission's rules. Accordingly, GTECA filed its tariffs, now in effect, governing both "halves" of the bandwidth. About the same time, Apollo filed its state court complaint seeking a judicial determination of the then "reasonable rate" for the lease of bandwidth. Apollo recently amended its complaint to add two causes of action requesting damages on account of alleged breaches of the original lease agreement.

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[6] Apollo's assertion that *U.S. Wats, Inc. v. American Tel. & Tel. Co.*, 1994 LEXIS 4074 (E.D. Pa. 1994), rejects GTECA's claim that any variance from the tariffs now in effect would result in unjust discrimination is misplaced. (Opposition, at 13, n. 15.) In *U.S. Wats*, the plaintiff brought an implied-in-fact contract action against AT&T for its refusal to transfer end-user accounts from one long distance reseller to another held by plaintiff. AT&T argued that since its alleged duty to tranfer end-user accounts was not contained in the applicable tariff, such duty was precluded by the filed rate doctrine. *Id.* at *13. The court concluded that AT&T interpreted the filed rate doctrine too broadly since the adjudication of plaintiff's contract claim "will neither result in rate discrimination nor embroil the court in a dispute over the reasonableness of AT&T's charges in contravention of the FCC's rate-making authority." *Id.* at *13-14. In contrast, Apollo's claims will result in both rate discrimination as well as judicial intrusion into the Commission's authority if the court awards Apollo damages calculated under its own determination of the "reasonable rate" at variance with the tariff rate (as Apollo demands).

Consequently, a controversy has arisen as to the propriety of Apollo's actions--and specifically the damages Apollo requests--in light of the filed rate doctrine. Pursuant to the Administrative Procedure Act and the Commission's rules, this Commission has authority to terminate this controversy. 5 U.S.C. § 554(e); 47 C.F.R. § 1.2.

B. Apollo's Request For Damages Flowing From the Preexisting Lease Agreement Is Barred By The Well Established Filed Rate Doctrine.

1. Apollo's requested relief operates as an undue preference.

By phrasing its Complaint as a simple contract action, Apollo attempts to disguise the fundamental subject matter of its Complaint, the second half of the bandwidth, which is subject to Commission jurisdiction and governed by a filed tariff that became effective on July 18, 1994. Thus, regardless of who leases the bandwidth (whether it be Service Corp., Apollo or a third party), such lessee is subject to the terms of the filed tariff. This is the essence of common carriage. *See MCI Telecommunications Corp. v. American Tel. & Tel. Co.*, 114 S. Ct. 2223 (1994); *Southwestern Bell Corp. v. F.C.C.*, 1995 U.S. App. LEXIS 1071 (Jan. 20, 1995). The corollary, of course, is that the filed tariff must be strictly observed. *Cincinnati, N.O. & T. P. Ry. Co. v. Chesapeake & O. Ry. Co.*, 441 F.2d 483 (4th Cir. 1971), citing *Texas & P. Ry. Co. v. Mugg & Dryden*, 202 U.S. 242, 245 (1906) (existence of a preexisting contract is irrelevant to the rate which must be paid by the customer). Any variance from the filed rate would constitute an undue preference. *Keogh v. Chicago & N. W. Ry. Co.*, 260 U.S. 156 (1922). Enforcement of any preexisting contract rate "would be giving a preference to and discriminating in favor of the customer in question." *Marco Supply Co. v. AT&T Communications, Inc.*, 875 F.2d 434, 436 (4th Cir. 1989).

Apollo argues that there is no preference because the "bandwidth at issue is not now available to Apollo either by lease or by tariff." (Opposition, at 20.) Apollo claims

that it is merely attempting to enforce its contract rights by seeking "damages for GTE's refusal to make that bandwidth available to Apollo pursuant to the parties' agreements." (Opposition, at 24.) However, the tariff rate which governs the bandwidth is an indispensable element of the purported damages arising out of "GTE's refusal to make the bandwidth available to Apollo pursuant to the parties' agreements." (Opposition, at 24.) For Apollo to obtain the relief that it seeks (money damages), the state court must necessarily evaluate what Apollo would have received had it leased the second half of the bandwidth. Specifically, if Apollo leased the second half of the bandwidth, it would be subject to the tariff rate. And the tariff rate would have constituted Apollo's primary expense in calculating future profits for purposes of determining damages.

Under its complaint, Apollo's alleged damages would flow from its detriment proximately caused by GTECA's purported failure to offer Apollo the bandwidth under the terms of the Lease Agreement, *i.e.*, at some unstated "reasonable market rent." Apollo's damage calculation (measured in terms of lost profits) requires an analysis of Apollo's expected revenues versus its expected expenses, of which the cost of leasing the bandwidth is the primary element of expense. However, Apollo's complaint expressly asks the state court to eschew the tariff rate and to set its own "reasonable rate" for the tariffed service.[7] Such a damage calculation would ignore the reality that the rate for the bandwidth is not some "reasonable rate" as determined by a state court

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[7] Apollo urges the state court to set the "reasonable rate" at a "significantly lower figure" than that filed pursuant to the tariff. (Opposition, at 5.) Despite the filed tariff rate of $81,764 per month, Apollo has previously argued that the reasonable rate for the bandwidth is a mere $1,960 per month. Apollo suggested this amount in a "Report of Reasonable Market Rent for Excess Bandwidth Capacity," dated November 15, 1993. No reasonable person could doubt that seeking a lease rate at less than 3% of the actual tariff rate is preferential.

(or anyone else), but rather the filed tariff rate as regulated by the Commission. Thus, if Apollo were to obtain its specifically requested relief on the basis of a "reasonable rate" that was lower than the tariff rate--which is precisely what Apollo seeks to do--this would operate as an undue preference in violation of Section 203(c).

Accordingly, the Commission, with its broad authority to effect compliance with the filed rate provisions of Title II, must declare that Apollo's state court action infringes upon the anti-discriminatory rate provision of Section 203(c) to the extent it seeks damages calculated pursuant to some "reasonable market rate" other than the tariffed rate.

2. Apollo's action necessarily requires a retroactive judicial determination of the reasonableness of the bandwidth lease rate in derogation of the Commission's jurisdiction.

Despite Apollo's contention to the contrary, GTECA does not assert "that *all* of Apollo's conduct vis-a-vis GTECA is limited by reference to tariff, even to the exclusion of civil suit damages recovery." (Opposition, at 21.) What GTECA does contend is that civil suit damages are not available under the filed rate doctrine for actions which require a judicial determination of what the "reasonable rate" should have been. *See Wegoland, Ltd. v. NYNEX Corp.*, 806 F. Supp. 1112 (S.D.N.Y. 1992); *U.S. Wats, Inc. v. American Tel. & Tel.*, 1994 U.S.Dist.LEXIS 4074, *11 (E.D. Pa. 1994) (discussing *Wegoland*'s "non-justiciability" principle which mandates dismissal of any claims challenging a tariffed rate because the regulatory agency's primary jurisdiction over the reasonableness of rates must be preserved.)

Although *Wegoland* and *U.S. Wats, Inc.* are cited by Apollo in its Opposition, both directly support GTECA's position. In *Wegoland*, the court did *not* allow recovery on a fraud cause of action brought against telephone companies by ratepayers who

alleged that, on account of the telephone companies' wrongdoing, the tariff rate was unreasonably high. Relying on the principles set forth in *Montana-Dakota Util. Co. v. Northridge Pub. S. Co.*, 341 U.S. 246 (1951), the *Wegoland* court properly refused to retroactively determine the reasonableness of rates. In *Montana-Dakota*, "the core justification for this refusal was that plaintiff was asking the court to adjudicate what a reasonable rate would be, and the Court deemed that to be a non-justiciable issue, more appropriately determined by the Commission." *Wegoland*, 806 F. Supp. at 1114. Specifically, *Montana-Dakota* held that "[t]o reduce the abstract concept of reasonableness to concrete expression in dollars and cents is the function of the Commission. . . . A court may think a different level more reasonable." *Montana-Dakota*, 341 U.S. at 250-51. Indeed, the *Wegoland* court recognized that the plaintiffs were seeking an award of damages for fraud and did not explicitly ask the court to determine reasonable rates (as Apollo does in its complaint). Nonetheless, the court found that "such an award would effectively require determining what a reasonable rate would have been," and therefore dismissed the action. *Wegoland*, 806 F. Supp. at 1122.

Similarly, in *H.J. Inc. v. Northwestern Bell Telephone Co.*, 954 F.2d 485 (8th Cir. 1992), the Court of Appeals rejected the argument that the filed rate doctrine does not apply simply because the plaintiffs did not ask the court to engage in ratemaking activities. Specifically, as in the instant case, the court recognized that a claim for RICO damages "can only be measured by comparing the difference between the rates the Commission originally approved and the rates the Commission should have approved absent the conduct of which the class complains." *H.J. Inc.*, 954 F.2d at 494. Thus, the Court affirmed dismissal of the action, stating: "[t]he filed rate doctrine

prohibits a party from recovering damages measured by comparing the filed rate and the rate that might have been approved absent the conduct in issue." *Id.* at 488, citing *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 578-79 (1981).

In this case, *each* of Apollo's causes of action requires the state court to engage in retroactively determining the "reasonable rate" of the bandwidth, thus running afoul of the filed rate doctrine. As discussed above, any damages for Apollo's first cause of action would be measured by the amount that would compensate Apollo for the alleged detriment proximately caused by GTECA's conduct. *Harm v. Frasher*, 181 Cal. App. 2d 405, 418 (1960). Apollo's alleged "detriment" would be what it would have received as profit if it had been able to lease the bandwidth under the "reasonable market" rent. This retroactive rate setting by the state court would infringe upon the Commission's authority in determining the reasonableness of the tariff rate, thereby violating the filed rate doctrine's non-justiciability principle. As *Wegoland* and *H.J. Inc.* make clear, the filed rate doctrine applies whether or not Apollo expressly asks the state court to make a retroactive rate determination. *Wegoland*, 806 F. Supp. at 1122; *H.J. Inc.*, 954 F.2d at 492-94.

Similarly, Apollo's second cause of action will require a retroactive evaluation of the rate under the lease agreement. Under California law,"[t]he proper measure of compensatory damages for wrongful interference with a business is: the diminution of the value of the business traceable to the wrongful act, as reflected by loss of profits, expenses incurred, or similar concrete evidence of injury." *Diodes, Inc. v. Franzen*, 260 Cal.App.2d 244, 257 (1968). Therefore, whether or not there was a diminution of value to Apollo's business on account of being unable to lease the bandwidth at the then "reasonable market rate" necessarily requires a calculation of Apollo's expenses.

Again, these expenses would include the *actual* cost of leasing of the bandwidth. Were the state court to ignore the filed tariff rate and instead substitute its own "reasonable rate"--as Apollo expressly requests--the state court would be engaging in retroactive rate setting, thereby infringing upon this Commission's jurisdiction over the reasonableness of rates. *U.S. Wats, Inc.*, 1994 U.S. LEXIS 4074, *11 (E.D. Pa. 1994).

Finally, Apollo's third cause of action for declaratory relief by its own language seeks a judicial "declaration that it has a valid enforceable contract right to lease the excess bandwidth at a reasonable market rent." (Complaint, ¶ 35.) Consequently, to grant Apollo relief, a court would *have* to engage in retroactive rate setting, a practice in direct contravention of the non-justiciability principle behind the filed rate doctrine.[8] Because the state court has already declined to stay Apollo's action based upon the primary jurisdiction of the Commission, the Commission must intervene in order to preserve its ratemaking authority.

C. Apollo's Reliance On The Savings Clause Is Misplaced Since Its Claims Interfere With The Regulatory Scheme Of The Act.

Section 414 of the Act, referred to as "the savings clause," has been construed to preserve "causes of actions for breaches of duties distinguishable from those created under the Act." *Cooperative Communications, Inc. v. AT&T Corp.*, 867 F. Supp. 1511, 1516 (D. Utah 1994). Specifically, common law causes of action which do not conflict with the provisions of the Act or interfere in any way with the regulatory scheme

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[8] For these reasons, Apollo's reference to *Litton Systems, Inc, v. American Tel. & Tel. Co.*, 700 F.2d 785, 820 (2nd Cir. 1983), as distinguishing *Keogh*, on the ground that "where the plaintiff does not seek to have the court determine even indirectly what a reasonable rate would be" (Opposition, at 24), does not apply here. *See H.J. Inc.*, 954 F.2d at 492.

implemented by Congress are preserved. *Bruss Co. v. Allnet Communications Services, Inc.*, 606 F. Supp. 401, 411 (N.D. Ill. 1985).

Apollo's causes of action, although framed as state law theories, directly impinge upon the regulatory provisions of the Act. Here, Apollo explicitly seeks to enforce contract terms governing the lease of the bandwidth despite the fact that the use of this bandwidth is now governed by tariff. Apollo's requested relief necessarily depends upon a state court determination of the "reasonable rate" for the lease of the bandwidth, *i.e.*, some rate *other than* the tariffed rate. Such a determination directly interferes with both the provisions of the Act and the regulatory scheme implemented by Congress. "[A] dispute as to whether a carrier's rates or practices are reasonable has uniformly been deemed to be within the primary jurisdiction of the appropriate regulating agency." *Bruss*, 606 F. Supp. at 408. Consequently, the cases cited by Apollo are inapposite in that they involve state law claims which neither conflict with the Act nor interfere with the regulatory scheme of the Act.[9]

Accordingly, since Apollo's complaint directly infringes upon Congress' regulatory scheme in that it explicitly requests a state court to determine the "reasonableness" of rates--a question committed to the jurisdiction of the Commission--the savings clause does not apply.

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[9] *E.g., American Inmate Phone Systems, Inc. v. US Sprint Communications Co.*, 787 F. Supp. 852, 856 (N.D. Ill. 1992) (breach of alleged verbal contract setting up business relationship preserved since no issue as to reasonableness of rate); *In re Long Distance Telecommunications Litigation*, 831 F.2d 627, 634 (6th Cir. 1987) (common law actions based upon fraud and deception preserved where the activity in question is a failure to inform the customer of a practice, not an attack on the practice itself); *Cooperative Communications, Inc. v. AT&T Corp.*, 867 F. Supp. 1511 (D. Utah 1994) (state law causes of action for business disparagement, fraud and misrepresentation do not involve the *provision* of telecommunications services and thus are insufficient to fall within scope of Act).

III. CONCLUSION

For all the foregoing reasons, the Commission should grant a declaration pursuant to its authority under 47 C.F.R. § 1.2 that Apollo's requested relief for damages calculated pursuant to some state court determined "reasonable rate" violates the filed rate doctrine in that it constitutes an undue preference (or rebate) and infringes upon the Commission's authority to establish the reasonableness of rates.

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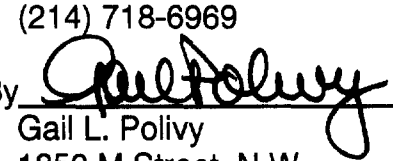
By 

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March 15, 1995

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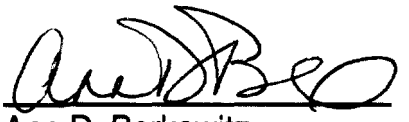
Certificate of Service

I, Ann D. Berkowitz, hereby certify that copies of the foregoing "Reply of GTE California Incorporated To Apollo's Opposition For Declaratory Ruling" have been mailed by first class United States mail, postage prepaid, on the 15th day of March, 1995 to all parties on the attached list.



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